No. 02-299

SUPREME COURT, U.S.
APR 2 2003

In The

Supreme Court of the United States

ENTERGY LOUISIANA, INC.,

Petitioner,

v.

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Louisiana

BRIEF FOR RESPONDENTS

EVE KAHAO GONZALEZ, ESQ.
General Counsel
LOUISIANA PUBLIC SERVICE COMMISSION
One American Place,
Suite 1630
Baton Rouge, Louisiana
70821

MICHAEL R. FONTHAM*
PAUL L. ZIMMERING
NOEL J. DARCE
DANA M. SHELTON
JASON M. BILBE
STONE PIGMAN WALTHER WITTMANN L.L.C.
546 Carondelet Street
New Orleans, Louisiana
70130
(504) 581-3200

Counsel for Respondents

**Counsel of Record*

April 2, 2003

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

When a holding company system violates the objective terms of a cost allocation contract filed with the Federal Energy Regulatory Commission ("FERC") and overcharges one of its subsidiaries for facilities that are ineligible to be included in the contractual assessments, does the Supremacy Clause require a state regulatory commission to pass the excess charges through to retail ratepayers?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

1. Overview 1
2. LPSC authority to examine affiliate transactions 2
3. Denial of authority to FERC to award reparations 5
4. The FERC's assertion of power to grant refunds for overcharges 8
5. FERC proceeding concerning Entergy's first tariff violation 9
6. Adoption of a tariff amendment with specific parameters to curb Entergy's discretion 13
7. Entergy's violation of the amended tariff 15
8. LPSC proceeding 16

SUMMARY OF ARGUMENT 20

ARGUMENT 23

I. NO BASIS EXISTS IN THE FEDERAL POWER ACT, THE DECISIONS OF THIS COURT, OR OTHER RULINGS TO SUPPORT A HOLDING THAT THE FERC HAS EXCLUSIVE JURISDICTION TO HEAR CASES INVOLVING TARIFF VIOLATIONS 23

A. The Federal Power Act Does Not Vest the FERC With Exclusive Jurisdiction to Interpret Tariffs and Correct Tariff Violations 24

TABLE OF CONTENTS – Continued

Page

B. The *Nantahala* and *MP&L* Cases Deal With the FERC's Exclusive Jurisdiction to Establish Tariffs, Not the Shared Jurisdiction of Enforcement, and Have No Application Here 35

C. The LPSC's Decision to Disallow an Excessive Affiliate Allocation Was an Appropriate Exercise of the State's Regulatory Function and Does Not Illegally "Trap" Costs 39

II. THE NEW RULE OF "PRESUMPTIVE UTILITY PREEMPTION" PROPOSED BY ELI AND THE *AMICI* WOULD SUBVERT THE INTENT OF THE FEDERAL POWER ACT AND IMPROPERLY HANDCUFF STATE REGULATORS 43

CONCLUSION 49

TABLE OF AUTHORITIES

Page

CASES

Arkansas Elec. Coop. Corp. v. Arkansas Public Service Comm'n, 461 U.S. 375 (1983) 34

Arkansas Louisiana Gas Co. v. Hall, 7 F.E.R.C. ¶ 61,175 (1979) 8, 31, 32

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 25, 31, 32, 36, 37, 42

Brown v. MCI WorldCom Network Services, Inc., 277 F.3d 1166 (9th Cir. 2002) 8, 29, 31

Ex parte Central Louisiana Elec. Co., Order No. U-13172-A, 1979 La. PUC LEXIS 71 (La. P.S.C. 1979) 3

Cleveland Electric Illuminating Co. v. City of Cleveland, 363 N.E.2d 759 (Ohio Ct. App. 1976), *cert. denied*, 434 U.S. 856 (1977) 8

Consolidated Gas Trans. Corp. v. FERC, 771 F.2d 1536 (D.C. Cir. 1985) 8, 9, 28

Consolidated Terminal Systems, Inc. v. ITT World Communications, Inc., 535 F. Supp. 225 (S.D.N.Y. 1982) 30

Daily Advertiser v. Trans-La., 612 So. 2d 7 (La. 1993) 2

In re Entergy Arkansas, Inc., Order No. 31, Docket No. 96-360-U (Ark. P.S.C. 1997) 16

Ex parte Entergy Corp. and Gulf States Utilities Co., Order No. U-19904, 1993 La. PUC LEXIS 212 (La. P.S.C. 1993) 3, 16

TABLE OF AUTHORITIES – Continued

Page

Ex parte Entergy Louisiana, Inc. and Entergy Gulf States, Inc., Order No. U-24889, 2000 La. PUC LEXIS 223 (La. P.S.C. 2000) 47

Ex parte Gulf States Utilities Co., Order No. U-23358, 2002 La. PUC LEXIS 17 (La. P.S.C. 2002) 4

Ex parte Entergy Louisiana, Inc. and Entergy Technology Co., Order No. U-22225-A 1999 La. PUC LEXIS 88 (La. P.S.C. 1999) 4

Ex parte Louisiana Power & Light Co., Order No. U-20925 (corrected), 1995 La. PUC LEXIS 39 (La. P.S.C., 1995) 16

Great N. R. Co. v. Merchants Elevator Co., 259 U.S. 285 (1922) 7, 25, 31

Gulf States Utilities Co. v. Alabama Power Co., 824 F.2d 1465 (5th Cir. 1987) 8, 28, 29

Gulf States Utilities Co., v. Louisiana Public Service Comm'n, 689 So. 2d 1337 (La. 1997) 39

In re South Central Bell Tel. Co., Order No. U-17949-G, 121 P.U.R. 4th 338, 1991 La. PUC LEXIS 18 (La. P.S.C. 1991) 3

Louisiana Pub. Serv. Comm'n v. FERC, 184 F.3d 892 (D.C. Cir. 1999) 46

Louisiana Pub. Service Comm'n v. FCC, 476 U.S. 355 (1986) 34

Louisiana Pub. Service Comm'n v. FERC, 174 F.3d 218 (D.C. Cir. 1999) ..... *passim*

Middle South Energy, Inc., 31 F.E.R.C. 61,305 (1985) 5, 10

TABLE OF AUTHORITIES – Continued

Page

Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354 (1988) ..... *passim*

Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951) ..... *passim*

Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986) ..... *passim*

National Communications Ass'n v. AT&T Corp., 46 F.3d 220 (2d Cir. 1995) 31

North American Co. v. Securities and Exchange Comm'n, 327 U.S. 686 (1946) 3

Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co., Inc., 297 F.2d 561 (8th Cir.), *cert. denied*, 370 U.S. 937 (1962) 8, 26, 30

Pan American Petroleum Corp. v. Superior Court of Del., 366 U.S. 656 (1961) 7, 26, 37

Pennsylvania R. Co. v. Chromcraft Corp., 424 S.W.2d 104 (Mo. Ct. App. 1967) 30

Pennsylvania R. Co. v. Nasshorn, 116 N.Y.S.2d 365 (N.Y. App. Div. 1952) 30

Portland General Electric Co., 72 F.E.R.C. ¶ 61,009 (1995) 32

PPL Montana, LLC, 96 F.E.R.C. ¶ 61,313 (2001) 8, 32

Public Service Co. of New Hampshire v. New Hampshire Elec. Coop., Inc., 55 F.E.R.C. ¶ 61,028 (1991) 32, 33

Public Utilities Comm'n v. Attleboro Steam & Electric Co., 273 U.S. 83 (1927) 5, 22, 44

Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co., 81 F.E.R.C. ¶ 61,056 (1997) 8, 32

TABLE OF AUTHORITIES – Continued

Page

South Central Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n, 594 So. 2d 357 (La. 1992) 3

Southern Pacific Transp. Co. v. San Antonio, 748 F.2d 266 (5th Cir. 1984) 30

Towns of Concord, Norwood & Wellesley v. FERC, 955 F.2d 67 (D.C. Cir. 1992) 9, 28

Union Pac. R.R. v. Structural Steel & Forge Co., 344 P.2d 157 (Utah 1959) 30

United States v. Garner, 134 F. Supp. 16 (E.D.N.C. 1955) 30

STATUTES

La. Const. Art. IV, § 21 ..... 2, 27, 39

La. R.S. 45:1176 ..... 2, 27, 39

15 U.S.C. § 79a(b)(2) 44

16 U.S.C. § 824(a) 5

16 U.S.C. § 824d 5, 24, 27

16 U.S.C. § 824e 24, 27

16 U.S.C. § 824e(a) 6

16 U.S.C. § 825m 6, 27, 34

16 U.S.C. § 717o 28

MISCELLANEOUS

H.R. REP. NO. 74-1318 (1935) 34, 41

S. REP. No. 74-1725, § 213(a) 6

TABLE OF AUTHORITIES – Continued

Page

S. REP. No. 74-1903 (1935) 43

S. REP. No. 74-621 (1935) 5, 6, 27, 44

STATEMENT OF THE CASE

1. Overview. In this case, Entergy Corp. ("Entergy"), an electric utility holding company with operating companies in four states, violated the objective terms of a contract filed with the Federal Energy Regulatory Commission ("FERC") that provided for allocating electric generation costs among the operating companies. Entergy failed to comply with specific prerequisites, established by the FERC in approving a contract amendment, for including the costs of mothballed units in the assessments made pursuant to the contract. The Louisiana Public Service Commission ("LPSC"), a regulatory commission with plenary authority to regulate utility rates in Louisiana, discovered the overassessment and disallowed it in setting the retail rates of petitioner, Entergy Louisiana, Inc. ("ELI"). ELI and its *amici*, the United States and the Edison Electric Institute ("EEI"), now request that this Court fashion a new rule of federal preemption, in which utility violations of FERC-filed contracts would have presumptive validity under the "filed-rate" doctrine, subject to correction only by the FERC.

No one disputes the LPSC's finding that Entergy charged ELI for units in extended reserve shutdown ("ERS") that were not eligible to be included in the contractual billings. A dispute could not be raised in this Court because ELI litigated the contract issue before the LPSC, lost the issue, and did not appeal it. The contract requires adherence to a specific process for determining whether ERS units may be a basis for cost assessments, with a necessary consideration of specific information, and Entergy ignored the requirements. Having found a contractual overcharge imposed by the holding company, the LPSC did what regulatory agencies are supposed to do – it

disallowed the overcharge so that retail ratepayers would not have to pay it. The LPSC flowed through to ratepayers all charges that were properly assessed pursuant to the contract.

The briefs of ELI and the *amici* characterize the LPSC's decision as a violation of the FERC's "exclusive jurisdiction" to correct tariff violations. [ELI Br. at 15, 28; U.S. Br. at 12-13]. But this characterization has an incorrect premise; this Court's rulings and many other authorities establish that the FERC does not have exclusive jurisdiction to enforce FERC-filed contracts. Despite the filed-rate doctrine, courts routinely interpret tariffs and resolve disputes between parties, and a state regulatory agency may do so as well to prevent injury to ratepayers from excessive holding company cost allocations.

2. LPSC authority to examine affiliate transactions. The LPSC, created by the Louisiana Constitution, has the power "to regulate all common carriers and public utilities" in the state. La. Const. Art. IV, § 21(B). It is authorized to exercise "plenary" power over the reasonableness of utility rates, meaning "full, entire, absolute, perfect, unqualified" power. *Daily Advertiser v. Trans-La.*, 612 So. 2d 7, 23 (La. 1993). This authority requires the LPSC to ensure that only reasonable, prudent and lawfully-incurred costs are assessed to Louisiana consumers.

One of the primary functions of regulators, both at the state and federal level, is to ensure that cost assessments, especially those exchanged among affiliated companies, are reasonable. La. R.S. 45:1176 instructs the LPSC to examine the costs incurred by public utilities under all contracts with others, "whether affiliated with such public utilities or not," and to disallow excessive charges. Because corporate parents may maximize their profits by

overcharging regulated entities through contracts with affiliates and misallocating costs to maximize earnings, regulatory commissions must be vigilant to prevent affiliate abuses. Indeed, the Public Utility Holding Company Act, passed by Congress along with the Federal Power Act, was intended in part "to restore effective state regulation, . . . which had been seriously impaired by the existence and practices of nation-wide holding company systems." *North American Co. v. Securities and Exchange Comm'n*, 327 U.S. 686, 704 (1946).

In fulfilling its regulatory responsibilities, the LPSC often examines the legitimacy of affiliate arrangements. For example, in 1991 the LPSC imputed to South Central Bell Telephone Co. the earnings of an affiliate that had been created to publish the Yellow Pages, and adjusted payments made to another affiliate for Yellow Page sales commissions. *In re South Central Bell Tel. Co.*, Order No. U-17949-G, 121 P.U.R. 4th 338, 1991 La. PUC LEXIS 18, *15-*24 (La. P.S.C. 1991), *reversed on other grounds, South Central Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 594 So. 2d 357 (La. 1992). In a case involving Central Louisiana Electric Co., the LPSC imputed into the utility's earnings its profit from a subsidiary that provided fuel for regulated operations. *Ex parte Central Louisiana Elec. Co.*, Order No. U-13172-A, 1979 La. PUC LEXIS 71 (La. P.S.C. 1979).

In the case of Entergy, the LPSC often has occasion to examine the propriety of affiliate allocations. At the time of the merger between Entergy and Gulf States Utilities Co., the LPSC adopted a number of "Affiliate Interest Conditions" as a requirement for approval of the merger. *Ex parte Entergy Corp. and Gulf States Utilities Co.*, Order No. U-19904, App. C, 1993 La. PUC LEXIS 212 (La. P.S.C.

1993). In 1999, it reformed a contract between ELI and Entergy Technology Co., which provided for the unregulated technology company to resell unused fiber optic capacity that was supported by ELI's rates. The LPSC found that the "terms of the proposal are unduly favorable to ETC." *Ex parte Entergy Louisiana, Inc. and Entergy Technology Co.*, Order No. U-22225-A at 8, 1999 La. PUC Lexis 88 (La. P.S.C. 1999). It pointed out that Entergy had an incentive to "shift costs to ELI, as those costs will be recovered from the ratepayer." *Id.* at 11.

In a recent case involving Entergy Gulf States, Inc. ("EGS") an administrative law judge recommended numerous adjustments to costs allocated by Entergy to EGS. Final Recommendation, *Ex parte Entergy Gulf States, Inc.*, Docket No. U-23358 (La. P.S.C. Sept. 1, 2002). The cost misallocations included overassessments from both unregulated and regulated operations. With respect to nuclear operations, the ALJ found that Entergy employed incorrect allocation codes to shift costs from Entergy Arkansas, Inc. ("EAI") to EGS. *Id.* at 51-62. Shifting the costs to Louisiana would maximize Entergy's cash flow, because the LPSC for years has conducted annual rate reviews, while the overall rates of EAI have not been adjusted annually. The adjustments were adopted by the Commission in an Order approving a settlement. *Ex parte Gulf States Utilities Co.*, Order No. U-23358, 2002 La. PUC Lexis 17 (La. P.S.C. 2002).

A parent may maximize its profits through affiliate arrangements in two fundamental ways. First, it may adopt unfair contracts or allocation methodologies. In the case of the System Agreement, the FERC approved the contract in 1985, but it disapproved a related agreement

for allocating the costs of the Grand Gulf nuclear plant among the Entergy Operating Companies because it assigned none of these costs to EAI's predecessor, Arkansas Power & Light Co. *Middle South Energy, Inc.*, 31 F.E.R.C. ¶ 61,305 (1985). The contract was reformed to allocate the costs fairly. Second, the parent may deviate from accepted or approved cost allocation methodologies in order to maximize profits. An example is the exercise of "discretion" to breach a FERC-approved tariff.

3. Denial of authority to FERC to award reparations. In 1935, Congress adopted the Federal Power Act ("FPA") to fill a "gap" in the regulation of electric utilities that was created when this Court held that the Interstate Commerce Clause prevented the states from regulating interstate wholesale electric transactions. *Public Utilities Comm'n v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927). The goal of the FPA, as stated in the declaration of policy, was to permit the Federal Power Commission ("FPC") – later the FERC – to regulate interstate wholesale transactions, "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). As stated in a Senate report, the FPA was intended to extend Federal regulation "to those matters which cannot be regulated by the States in the exercise of their regulatory powers, but not to impair or diminish the power of any State commission." S. REP. No. 74-621, at 48 (1935).

In empowering the FERC to regulate wholesale rates, Congress required that new contracts for wholesale sales be filed with the agency. It empowered the FERC to modify those contracts, either on its own motion or pursuant to a complaint, on a prospective basis. 16 U.S.C. § 824d. The FPA also authorized the FERC to suspend a changed

schedule for up to five months and to grant refunds for excessive amounts collected during the period required to review it. *Id.* With regard to existing rates, Congress provided the FERC authority to investigate and determine whether the rates are unreasonable and to grant *prospective* relief. 16 U.S.C. § 824e(a). But Congress granted the FERC no authority to award refunds or other reparations for charging an unreasonable filed rate or charging more than the filed rate permits.

An early version of the FPA would have empowered the FERC to investigate whether a utility had charged an "unreasonable, excessive, or discriminatory amount . . . in violation of any provision of this title" and "make due reparation to the complainant. . . . " S. REP. 74-1725, § 213(a) (1935). That provision was removed in the Senate by the Committee on Interstate Commerce. It determined that the power to issue reparation orders was an "appropriate sectio[n] for a State utility law, but the committee does not consider [it] applicable to one governing merely wholesale transactions." S. REP. No. 74-621, at 20 (1935). Congress provided authority for the FERC to file an injunction suit in a "proper District Court of the United States" if it determined that a utility was violating the Act or one of its orders. 16 U.S.C. § 825m.

The fact that the FERC was granted no reparations authority has been recognized by this Court. In a dissenting opinion in *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), a case in which the Court held that the filed-rate doctrine prevented a court from reforming past rates, even when those rates were obtained through fraud, Justice Frankfurter recognized that the FPC had no authority to award damages for violations

of the Act. He contended in dissenting that a court should be able to award these damages. He said:

> We have seen that [the Federal Power Act] does not authorize the Commission to award reparations to those subjected to unreasonable rates. The Act likewise does not afford to the Commission the authority conferred on administrative agencies under other regulatory statutes to award damages to those injured by violations of the Act. The Power Act, it is true, does give the Commission authority to look into past rates in order to determine whether the Act has been violated. But such an inquiry cannot be made the basis for an administrative award of damages to the victims of the violations. . . .
>
> *Id.* at 260 (citations omitted).

This statement reflected the fact that the statute provided no refund authority to the FPC beyond that contained in Section 205.

Congress had no need to vest the FPC with exclusive jurisdiction to determine tariff disputes because state courts were available to hear these common law contract claims. Indeed, this Court held in 1922 that the filed-rate doctrine did not prevent a state court from hearing a dispute concerning a tariff filed with the Interstate Commerce Commission. *Great N. R. Co. v. Merchants Elevator Co.*, 259 U.S. 285 (1922). The Court applied this same rule to the FPC in 1961. In a case arising under the Natural Gas Act ("NGA"), which is virtually identical to the FPA, the Court held that a state court may hear a claim that a customer was overcharged under a contract for the sale of natural gas that was filed with the FPC. *Pan American Petroleum Corp. v. Superior Court of Del.*, 366 U.S. 656 (1961).

Except when contractual issues are so technical or infused with policy as to require invoking the "primary" jurisdiction of a regulatory agency, courts often exercise authority to determine whether FERC-filed tariffs were violated and award damages. *Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co., Inc.*, 297 F.2d 561, 567 (8th Cir.), *cert. denied*, 370 U.S. 937 (1962); *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465, 1472 (5th Cir. 1987); *Cleveland Electric Illuminating Co. v. City of Cleveland*, 363 N.E. 2d 759 (Ohio Ct. App. 1976), *cert. denied*, 434 U.S. 856 (1977). This approach accords with decisions rendered under other statutory schemes. *E.g., Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166 (9th Cir. 2002). Indeed, the FERC frequently declines to exercise even its primary jurisdiction to interpret tariffs, leaving it to the courts to interpret and enforce contract language. *Arkansas Louisiana Gas Co. v. Hall*, 7 F.E.R.C. ¶ 61,175 (1979); *PPL Montana, LLC*, 96 F.E.R.C. ¶ 61,313, 62,208 (2001); *Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co.*, 81 F.E.R.C. ¶ 61,056, 61,278 (1997).

4. The FERC's assertion of power to grant refunds for overcharges. Although it has no statutory authority to award refunds for tariff violations, the FERC in the past two decades has asserted the inherent power to do so, and that determination has been accepted in the lower courts. In a leading case, *Consolidated Gas Trans. Corp. v. FERC*, 771 F.2d 1536 (D.C. Cir. 1985), the United States Court of Appeals for the District of Columbia Circuit recognized the absence of explicit authority to award refunds of improper collections under a tariff filed pursuant to the NGA. It upheld the FERC's authority to do so, however, by inferring it from the power to take

actions "necessary or appropriate to carry out the provisions of this chapter." *Id.* at 1550. In *Towns of Concord, Norwood & Wellesley v. FERC*, 955 F.2d 67 (D.C. Cir. 1992), the same court inferred this authority from a parallel provision of the FPA. *Id.* at 73. Although this Court does not appear to have decided the issue, the FERC's inferred power to interpret tariffs and award refunds appears to have become accepted.

Paradoxically, the FERC's assertion of this "equitable" refund authority permits a one-way departure from the filed-rate doctrine. On the one hand, the FERC has no power to retroactively adjust an unreasonable filed rate and require a seller to repay excessive amounts collected pursuant to that rate. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951). On the other, when a utility bills and collects amounts in excess of the filed rate, the courts have ruled that the FERC has "discretion" not to order refunds. *Towns of Concord, Norwood & Wellesley v. FERC*, 955 F.2d 67, 75 (D.C. Cir. 1992). By not ordering refunds, the FERC effectively sanctions the overcharge and reforms retroactively the filed rate.

5. FERC proceeding concerning Entergy's first tariff violation. The Entergy System Agreement provides the basis for equalizing among the operating companies certain cost imbalances associated with facilities that are "used" for the mutual benefit of all the companies. [Joint App. at 8.]. The System Agreement is a contract executed among the Entergy Operating Companies and Entergy Services, Inc. It provides the "contractual basis" for the planning, construction and operation of the transmission and generation facilities of the System and for equalizing the costs of certain facilities "used" for the benefit of all

the companies. [*Id.* App. at 8]. The agreement includes definitions, objectives, obligations of the operating companies, and service schedules for allocating costs, among other provisions. [Joint App. at 5-24 (excerpts)].

The 1982 System Agreement was approved by the FERC in 1985, in a decision that also allocated the costs of the Grand Gulf nuclear unit among the operating companies. *Middle South Energy, Inc.*, 31 F.E.R.C. ¶ 61,305 (1985). Service Schedule MSS-1 provided the basis for equalizing the costs of generating capability, based on the costs associated with oil and gas units. Under that Service Schedule charges could be assessed only for "available" generating units. Companies with less than their proportionate shares of "available" generation made equalization payments to companies with more than their proportionate shares. [See Joint App. at 16-17]. MSS-1 provided that "a unit is considered available to the extent its capability can be demonstrated and (1) is under the control of the System Operator, or (2) is down for maintenance or nuclear refueling." [Pet. App. at 123a].

In 1986, Entergy undertook a program to place units in ERS status, in order to save operating and maintenance costs. These units had been constructed decades earlier and many were in dilapidated condition. [Pet. App. at 113a ("specific examples" cited by the Louisiana Commission in FERC hearing)]. The ERS program allowed Entergy to reduce operating costs below the amounts included in retail rates, thus enhancing corporate profits. *Louisiana Pub. Service Comm'n v. FERC*, 174 F.3d 218, 227 (D.C. Cir. 1999). Only if Entergy filed for a rate change, or retail regulators initiated a rate proceeding, would the cost reductions be flowed through to retail ratepayers.

The ERS capacity did not meet the conditions for being deemed "available" under MSS-1. Indeed, the ERS capacity on the Entergy System was placed in storage for an indefinite time period, in a state of ill repair, and required extensive refurbishment to provide electricity to the System. [Pet. App. at 123a]. Nevertheless, the Entergy Operating Committee exercised its purported "discretion" to include the units as "available" for billing. This action increased the cost assessments to ELI and Entergy Mississippi, Inc. in comparison to what the costs otherwise would have been; it benefited EAI and Entergy New Orleans, Inc. ("ENO"), which had more-than-proportionate ERS capacity. [Pet. App. at 141a].

Entergy had good reason to continue requiring that payments be made for the ERS units. If the payment levels had changed, the System might have been forced to seek rate increases in Arkansas and New Orleans, and regulators in Louisiana and Mississippi might have been alerted to the need to pursue rate reductions. Thus, an Entergy executive admitted that the System sought to "maintain stability in MSS-1 payments and receipts so as to avoid the initiation of rate cases by state regulators." *Louisiana Pub. Service Comm'n v. FERC*, 174 F.3d 218, 229 (D.C. Cir. 1999). This strategy "proved successful until 1994." *Id.* By avoiding rate cases, the System reaped for shareholders the benefits of the ERS program and other cost reduction programs undertaken by the utility. *See id.* at 227, 230.

In 1993, in an order approving the merger of Entergy and Gulf States Utilities Co., the FERC instituted an investigation of whether Entergy had violated the System Agreement by treating the ERS units as "available." The case was assigned for hearing to a FERC administrative

law judge ("ALJ"). The ALJ determined that the System Agreement was "clear and unambiguous." Although Entergy claimed "discretion" to depart from the terms of the agreement, the ALJ found that discretion could not be inferred from the agreement. [Pet. App. at 125a]. The ALJ accepted Entergy's argument that the utility acted in "good faith," but asserted that "[g]ood faith, however, cannot excuse a tariff violation." [*Id.* at 125a]. The ALJ stated:

> There is no dispute that the System Agreement is the filed and legal rate. The filed rate is the only legal rate. It has long been established that a regulated utility may not charge rates for its services other than those properly filed with the appropriate regulatory authority.
>
> [*Id.* at 124a-125a (citations omitted)].

Paradoxically, after finding that "good faith . . . cannot excuse a tariff violation," the ALJ proceeded to recommend against refunds because "Entergy does not deserve censure or punishment for its good faith actions." [*Id.* at 124a, 139a].

The FERC affirmed this decision, but pointedly avoided any reliance on the "good faith" rationale. [*Id.* at 103a: "This is not a case where we are denying the imposition of refunds because Entergy acted in 'good faith'"]. Instead, the FERC relied heavily on a rationale advanced by Entergy, that violating the tariff was necessary to provide an "incentive" to the operating companies to comply with Entergy's directive to place units in ERS status. [*Id.* at 101a-102a]. According to the holding company, its operating companies might have resisted complying with the ERS program unless they kept a constant level of MSS-1 payments. [*Id.* at 164a (citing Entergy

testimony)]. The FERC also offered other reasons, including the assertion that the end result of the violation was just and reasonable. [*Id.* at. 103a].

The United States Court of Appeals for the District of Columbia Circuit affirmed the FERC's decision. *Louisiana Pub. Service Comm'n v. FERC*, 174 F.3d 218 (D.C. Cir. 1999). Applying a "'particularly narrow scope of review,'" it approved the FERC's determination that the operating companies needed an "incentive" to obey Entergy's directive to implement the ERS program. *Id.* at 224, 226-27. It also upheld a finding of no unjust enrichment from the tariff violation, although it acknowledged that the System acted to "avoid the initiation of rate cases by state regulators" so that it could retain the benefit of cost decreases. *Id.* at 229. The court explained that "it is hardly unusual for a utility whose rates are set by cost-of-service rate-making principles to seek to reduce its costs, thereby increasing profits, during the interim between rate-setting proceedings." *Id.* at 230.

6. Adoption of a tariff amendment with specific parameters to curb Entergy's discretion. Although it refused to order refunds, the FERC did approve an amendment to Service Schedule MSS-1 designed to deal explicitly with the ERS program. [Pet. App. 104a-105a]. The amendment provided that Entergy's Operating Committee could count ERS units as available if it had the "*intent of returning the unit to service at a future date*." [Pet. App. at 104a (emphasis in original)]. The Operating Committee could designate an ERS unit as available only if it performed a specified analysis, considered specific criteria, and recorded its findings in its minutes. [*Id.*] The amendment provided that a unit could be deemed "available" if it:

> *is in extended reserve shutdown (ERS) with the intent of returning the unit to service at a future date in order to meet Entergy System requirements. The Operating Committee's decision to consider an ERS unit to be available to meet future System requirements shall be evidenced in the minutes of the Operating Committee and shall be based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, the projected cost of maintaining such unit, and the projected cost of returning the unit to service.*
>
> *Id.* (emphasis in original).

The LPSC contended at the FERC that this amendment provided too much discretion to Entergy. The Company denied this contention, stating that the "modified language requires the Operating Committee to document its decisions and to explain on the basis of sensible parameters why an ERS unit continues to warrant being counted in MSS-1." [Brief on Exceptions of Entergy Services, Inc., Docket No. EL94-13-000 (F.E.R.C.)]. The ALJ rejected the LPSC's vagueness argument, holding that the "amendment is neither ambiguous nor does it provide the Operating Committee with unfettered discretion. The amendment sets out the parameters of the Operating Committee's discretion." [Pet. App. at 152a]. Similarly, the FERC ruled that the amendment sufficiently "define[d] the parameters that the Operating Committee must follow in determining whether a unit is eligible for inclusion in Schedule MSS-1." [Pet. App. at 164a]. The court of appeals affirmed this determination, holding that review of Entergy's conduct would be "facilitated by the requirement that the operating committee record the reasons for its decision in writing." *Louisiana Pub. Service Comm'n v. FERC*, 174 F.3d 218, 231 (D.C. Cir. 1999).

7. Entergy's violation of the amended tariff. The amended tariff was approved in Opinion No. 415, issued August 5, 1997. On September 30, 1997, the Operating Committee met, reviewed the new language, and declared that "the units currently in ERS should continue to be deemed 'available' for purposes of determining company capability." [Resp. App. at 13]. In doing so, the Operating Committee failed to engage in the process contemplated by the FERC or to analyze the information designated in the "parameters" established by the FERC. [*Id.* at 12-15]. Further, the Operating Committee made no effort to record reasons, based on these "parameters," for its decision.

At its meeting, the Operating Committee reviewed a "Load and Capability Forecast" and approved it. This forecast showed that all the ERS capacity on the System – 1284 megawatts – would remain collectively in ERS status throughout the entire 10-year forecast period. [Resp. App. at 14, l.13]. The Operating Committee did not consider any "plan" to return the units to service at any "future date." [Resp. App. at 12-15]. Moreover, the Operating Committee had no information concerning "the projected length of time" any unit "would be in ERS status," nor did it have data concerning the "projected cost of maintaining such unit." [*Id.* at 12-15]. The Operating Committee was shown a one-page bar chart of projected costs of returning ERS units to service, which was labeled "Work in Progress" and was based on incomplete and outdated information. [*Id.* at 15; Pet. App. at 53a, 74a]. The Operating Committee recorded no analysis of relative costs, no theory of "system-wide" benefits, and no other substantive reason to support its decision to support its all-encompassing ERS decision. [Resp. App. at 13]. As a result of this decision, Entergy

continued to bill ELI for the costs of ERS units in other jurisdictions.

Although not mentioned in the Operating Committee minutes, Entergy had a good corporate reason to continue counting all the ERS units as "available." By 1997 the Louisiana Commission had instituted annual rate reviews of ELI and EGS. *Ex parte Louisiana Power & Light Co.*, Order No. U-20925 (corrected), 1995 La. PUC LEXIS 39 (La. P.S.C., 1995); *Ex parte Entergy Corp. and Gulf States Utilities Co.*, Order No. U-19904, App. 1, 1993 La. PUC LEXIS (La. P.S.C. 1993). Reduced MSS-1 payments for these companies would be reflected quickly in reduced retail rates. Investigations to reduce rates were not conducted annually for EAI and ENO. For a number of years, the Arkansas PSC had not conducted annual rate reviews. In 1996, EAI filed a request for a rate freeze and proposed a procedure that would allow EAI to set aside excess earnings as a protection against potential stranded costs in the event of deregulation. In late 1997 the Arkansas PSC approved a settlement implementing this procedure. *In re Entergy Arkansas, Inc.*, Order No. 31, Docket No. 96-360-U (Ark. P.S.C. 1997). New Orleans conducted annual reviews from 1994-96, but had only one review between 1996 and 2001.

8. LPSC proceeding. Under the Formula Rate Plan that the Louisiana Commission adopted for reviewing ELI's rates, ELI filed a report for the period commencing July 1, 1997, based on a 1996 test year. The LPSC's Staff examined the report and reached agreements with ELI on many ratemaking issues. The parties stipulated that three issues should proceed to hearing before an ALJ, including "whether payments under the System Agreement for the cost of generating units in Extended Reserve

Shutdown should be included or excluded from ELI's revenue requirement." [Pet. App. at 25a]. The evidentiary examination focused on whether Entergy violated the terms of the new tariff adopted by the FERC. Both ELI and the LPSC Staff submitted evidence on this issue.

The LPSC Staff argued that 1996 costs assessed to ELI pursuant to tariff violations should not be assessed to retail ratepayers. Although the FERC decided not to order refunds for the period 1986-97, the Staff contended that the costs included in the 1996 test year could be disallowed because they were assessed in violation of the original FERC tariff, and the FERC's decision not to order refunds *among the operating companies* did not require imposing the excessive charges on retail ratepayers. [*Id.* at 44a]. The Staff also argued that the Operating Committee's new decision at the September 30, 1997 meeting violated the tariff amendment and that costs incurred pursuant to that decision should not be assessed to ratepayers.

As to the 1996 costs, the ALJ and the LPSC held that the August 5, 1997 decision of the FERC retroactively validated Entergy's decision to assess charges in excess of the filed rate. As the Order noted, "in a seemingly paradoxical manner, FERC has approved the results of what it found to be a violation of a FERC tariff." [*Id.* at 63a]. The Order determined that it could not review the reasonableness of the 1996 payments because the FERC's decision effectively imposed "an obligation on ELI to make those payments." [*Id.* at 64a].

As pointed out repeatedly by ELI and the United States, the Louisiana Commission's Order contains the

statement that "a determination of violation or compliance with a FERC tariff is peculiarly within FERC's purview." [ELI Br. at 15; U.S. Br. at 19]. This statement paraphrases a contention of ELI in the proceeding and is not supported by any authority. [Pet. App. at 64a, 72a]. In view of this Court's holdings and the rulings of lower courts, the statement is literally untrue, because the FERC does not have exclusive jurisdiction to interpret FERC-filed contracts. The language may have been intended simply to acknowledge that the FERC, and not the LPSC, has the power to order refunds *among the operating companies* that are parties to the contract. [Pet. App. at 65a (contrasting refund decision with prospective issue); Pet. App. at 14a (Louisiana Supreme Court, in citing "exclusive jurisdiction" language in LPSC Order, states that the LPSC acknowledged it could not reexamine the refund decision)].

As the underpinning for its decision to disallow the ERS costs prospectively, the LPSC *did analyze* whether Entergy violated the terms of its tariff. It determined that ELI had a duty to incur only prudent costs, and that duty included the requirement to ensure that Entergy followed "the criteria set forth in the amended Section 10.02 in reaching a decision regarding the availability status of ERS units. . . . " [Pet. App. at 65a]. The LPSC conducted a hearing on this issue, one in which ELI participated and produced evidence. [Pet. App. at 46a]. ELI was hard pressed to contend that the Operating Committee satisfied the System Agreement's criteria; instead, it returned to the contention that the Operating Committee acted in "good faith," which purportedly "satisfied the criteria established by the FERC." [*Id.* at 48a].

The LPSC made extensive findings that the Operating Committee failed to follow the criteria established in the

tariff amendment for including ERS units in the MSS-1 assessments. It found that the Operating Committee had no plan to return an ERS unit to service at a particular time and did not even make the requisite effort "to ascertain that ERS units would be needed within the next 10 years." [*Id.* at 54a]. Moreover, the LPSC found that the Operating Committee did not reach a decision " 'based on consideration of current and future resource needs, the projected length of time the unit would be in ERS status, projected cost of maintaining such unit, and the projected cost of returning the unit to service.' " [*Id.* at 54a, 74a]. Indeed, the "Operating Committee did not even seek the information necessary to reach a well-considered decision." [*Id.* at 74a]. ELI stipulated that this issue be set for hearing, litigated the tariff compliance issue at the LPSC, and did not appeal the findings regarding the violation.

The Commission found that ELI was imprudent in acquiescing "to the parent company's decision without regard to the impact of such increased expenses on ELI's ratepayers." [*Id.*] Since the Operating Committee did not follow the "criteria set forth in the amended Section 10.02," ELI should not have paid the excess charges. [*Id.* at 74a, 75a]. The LPSC concluded that the "increased MSS-1 payments resulting from the treatment of ERS units as available under Schedule MSS-1 in violation of a FERC tariff should be removed from the company's calculation of its cost of service. . . . " [*Id.* at 77a].

A state district court and the Louisiana Supreme Court affirmed the LPSC's ruling. The Louisiana Supreme Court observed that the record supported the determination that Entergy did not comply with its tariff and "[t]he record is devoid of any attempt by ELI to minimize its

costs." [*Id.* at 20a]. Thus, the Court upheld the finding of imprudence.

SUMMARY OF ARGUMENT

1. In enacting the Federal Power Act, Congress vested the FERC with exclusive jurisdiction to review wholesale power contracts and establish just and reasonable rates. But Congress did not give the FERC exclusive jurisdiction, or *any* explicit jurisdiction, to determine contract disputes and award refunds for tariff violations. This Court and many others have ruled, both with respect to tariffs filed with the FERC and those filed with other regulatory agencies, that state and federal courts may interpret tariffs and award damages for violations. Only when a matter arises that falls peculiarly within the special expertise of a regulatory agency must a court defer, under the doctrine of "primary" jurisdiction, to the judgment of the agency as to the meaning of a tariff. If state and federal courts have the power to interpret tariffs, then so do state agencies. The fact that the FERC has inferred its own power to award refunds does not displace the jurisdiction of courts and state regulators. To support preemption, the Court must find from the statute that Congress intended to displace state jurisdiction.

2. Because they have no authority to support their claim of exclusive FERC jurisdiction to resolve tariff disputes, ELI and its *amici* seek to apply authorities holding that the FERC has exclusive jurisdiction to determine just and reasonable rates. Thus, they rely on *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986) ("*Nantahala*"), which involved a state agency's attempt to countermand a FERC power allocation, and *Mississippi Power & Light Co. v. Mississippi* ("*MP&L*"),

487 U.S. 354 (1988), which involved a state's attempt to review the reasonableness of costs deemed "just and reasonable" by the FERC, based on an issue that could have been raised at the FERC as it exercised its exclusive jurisdiction to establish the rate. Neither case involved a claim of a contract violation, or an attempt to pass through costs assessed in violation of a tariff. Thus, the cases do not apply in this context.

3. In disallowing charges assessed by Entergy to ELI for ERS units, the LPSC performed a necessary function of state regulatory agencies – it corrected a parent's abuse of affiliate relationships. The LPSC did not question the reasonableness of the contract amendment adopted by the FERC, but accepted that amendment as the predicate for its decision. The LPSC disallowed the excess charges because they were assessed in bald-faced violation of the tariff. Entergy ignored the process established by the FERC as a prerequisite for including an ERS unit in MSS-1 capacity, failed to consider the factors established by the FERC as a basis for an ERS determination, and failed to record its reasoning process in the minutes. No one can reasonably dispute the LPSC's finding that the "MSS-1 payments result[ed] from the treatment of ERS units as available under Schedule MSS-1 in violation of a FERC tariff. . . . " [Pet. App. at 77]. When affiliates allocate costs in violation of FERC-filed contracts, regulatory agencies are *supposed* to disallow the excess costs. *Nantahala* and *MP&L* implicitly require that action, just as they require state agencies to pass through the amount paid in compliance with the tariff.

4. ELI and its *amici* do not directly question the finding of a tariff violation; indeed, ELI never appealed that finding. Instead, these parties now request that the

Court adopt a *new rule* that the FERC should exercise exclusive jurisdiction over all claims that FERC-filed contracts have been violated. This new rule would require all aggrieved parties to go to the FERC when presented with an overcharge, and its preemptive effect would require state agencies to pass overcharges through to customers and pursue relief only at the FERC. In effect, they ask the Court to overrule precedent, hamstring state agencies, and create a never-ending line of claimants at the agency.

5. The FPA was designed to fill the *Attleboro* gap – a gap in the regulation of interstate transactions – and to *help*, not *hinder*, state agencies in their regulation of holding companies. Yet ELI, the United States, and EEI now advocate that the Court turn the FPA upside down and vest holding companies with federal preemptive power, subject to correction only in a complaint case at the FERC. ELI contends that determinations made by the Operating Committee "bind state commissions unless . . . disallowed by FERC. . . . "; the United States acknowledges the LPSC's finding of a violation, but contends that any charges assessed by Entergy under the System Agreement "are presumptively lawful, until FERC determines otherwise;" EEI argues for a "bright line" in which any charges assessed by a seller under a FERC-filed schedule should be deemed presumptively lawful as to all buyers and state agencies. [ELI Br. at 22-23; U.S. Br. at 13; EEI Br. at 11-12]. But if this Court hands preemptive power to holding companies and other utility sellers, it will permit the very type of damage to consumers that Congress sought to prevent.

6. State agencies are already handicapped in their efforts to regulate holding company subsidiaries. The

utility has the information necessary for regulation; it has virtually unlimited resources; it has expert consultants and experienced lawyers; and it has the ability to control transactions. To hand these companies a badge of presumptive correctness when they violate their own rate schedules would effectively countenance many affiliate abuses. State agencies do not have the resources to litigate every tariff violation at the FERC, and the FERC has little inclination to hear the cases. Thus, requiring resort to the FERC would empower holding companies to abuse FERC tariffs, a result inconsistent with the purpose of the FPA. Worse yet, creating a "bright line" rule under which future transmission operators may impose any contract interpretation on any buyer, subject only to FERC review, would pervert the intent of the FPA.

ARGUMENT

I. NO BASIS EXISTS IN THE FEDERAL POWER ACT, THE DECISIONS OF THIS COURT, OR OTHER RULINGS TO SUPPORT A HOLDING THAT THE FERC HAS EXCLUSIVE JURISDICTION TO HEAR CASES INVOLVING TARIFF VIOLATIONS.

In the FPA, Congress did not vest the FERC with exclusive jurisdiction to enforce tariffs. Indeed, Congress granted the FERC no jurisdiction to take this action, and the FERC apparently did not exercise it for decades. The FERC's assumption of "inherent" jurisdiction to award refunds for tariff violations, a jurisdiction that at best is shared with other tribunals, cannot support a claim of federal preemption. The basis for preemption must be found in the statute. But the FPA shows no intent to

displace state power or to grant the FERC "exclusive" jurisdiction over contract disputes.

Neither *Nantahala* nor *MP&L* suggests that the FERC possesses exclusive jurisdiction to interpret tariffs. Those cases dealt with the FERC's *ratemaking* power, in which state agencies attempted to disallow costs assessed *in compliance with* a FERC tariff. The FERC admittedly has exclusive jurisdiction to establish just and reasonable rates, but not to correct contract violations. State agencies may properly use the filed rate to determine whether a parent's charges to a subsidiary are correct and, if not, to disallow the excess costs. In this case, the LPSC used a federally-enacted standard as the basis for assessing utility conduct, just as Congress intended in passing the FPA. That action did not violate federal law.

A. The Federal Power Act Does Not Vest the FERC With Exclusive Jurisdiction to Interpret Tariffs and Correct Tariff Violations.

Nothing in the FPA requires that the FERC decide whether a FERC tariff has been violated. Sections 205 and 206 of the Federal Power Act provide exclusive jurisdiction to the FERC to determine just and reasonable wholesale rates. Section 205 permits the FERC to suspend a change in a rate schedule and refund excess amounts if it finds the new schedule excessive; Section 206 permits the FERC to make refunds for a limited period *after* the filing of a complaint if it finds that the filed rate was not reasonable. 16 U.S.C. §§ 824d, 824e. There is no explicit authority for the FERC to provide refunds based on tariff violations; that power has been *inferred* by the FERC, but this assumption of authority does not displace the power of

courts and state agencies to consider disputes that come within their jurisdiction concerning tariff violations.

The "filed-rate doctrine," which preserves the exclusive jurisdiction of regulatory agencies to establish just and reasonable rates, does not extend to cases involving tariff interpretations. This Court rejected that contention in *Great N. R. Co. v. Merchants Elevator Co.*, 259 U.S. 285 (1922), where it upheld the power of a state court to interpret and apply a tariff. In that case, an elevator company sued in state court to recover costs that it alleged were assessed in violation of a tariff approved by the Interstate Commerce Commission. The state court construed the tariff and determined whether the charge was correctly assessed.

This Court affirmed, holding that the tariff construction did not have to be determined by the ICC. It noted that the parties conceded the "validity of the tariff." *Id.* at 290. Further, although rate uniformity was a purpose of the Interstate Commerce Act, uniformity could be preserved through the process of appellate review. Thus, the Court determined that "the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission." *Id.* at 291. Instead, unless the matter requires the exercise of specialized agency expertise concerning the "peculiar meaning" of words, the state courts may construe a tariff. *Id.* at 292, 294.

This Court applied *Merchants Elevator* in ruling that the FPC did not have exclusive jurisdiction to interpret contracts under the NGA, a parallel statutory scheme that is virtually identical to the FPA. Indeed, the Court cites "interchangeably" precedents interpreting parallel provisions of the NGA and FPA. *Arkansas Louisiana Gas Co. v.*

Hall, 453 U.S. 571, 578 n.7 (1981). In *Pan American Petroleum Corp. v. Superior Court of Del.*, 366 U.S. 656 (1961), a Kansas agency mandated minimum prices to be paid for gas produced in Kansas, in excess of contract rates filed with the FPC. The state order mandating the minimum prices was overturned in this Court, and the customer sued in state court to recover the excess charges. The gas producers argued that the suit sought to enforce a federal tariff and could only be brought at the FPC, but the Court held that the suit presented a contract claim, subject to the jurisdiction of the state court. Since the suit did not seek to alter the terms of the contract, it did not fall within the exclusive jurisdiction of the FPC. *Id.* at 662-63. Further, the Court rejected the argument that FPC review was required for uniformity, holding that the process of appellate review could adequately ensure uniformity. *Id.* at 665. The Court concluded: "We hold that the state courts of Delaware do have jurisdiction to hear and decide the claims that Cities Services has formulated." *Id.* at 666.

This Court held that the state court could hear the contract dispute in *Pan American* because the claim arose under state contract law. Even though the contracts were filed with the FPC, that fact did not change the nature of the claim. 366 U.S. at 663. The Court said: "The rights as asserted by Cities Service are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of gas. . . . " *Id.* Given the holding that state courts may interpret FERC-filed contracts in the exercise of their state jurisdiction to hear contract disputes and award damages, state agencies should be free to do so in the exercise of their state jurisdiction to determine reasonable retail rates. In Louisiana,

that power is delegated explicitly to the LPSC. La. Const. Art. IV, § 21(B); La. R.S. 45:1176.

The determination that the FERC does not have exclusive jurisdiction to enforce tariffs has a strong statutory basis. In passing the FPA, Congress deliberately withheld from the FERC the power to make "reparations." S. REP. No. 74-621, at 20 (1935). It provided the FERC power to make refunds of changed rates for the period after a suspension and later, in 1988, provided limited power to refund rates deemed unreasonable for the period after the commencement of a Section 206 proceeding. 16 U.S.C. § 824d, § 824e. But the FERC was given no other refund authority, either for unreasonable rates in effect prior to a proceeding or for violations of a filed rate. Concerning violations, the FERC was empowered only to seek injunctive relief in a United States District Court. 16 U.S.C. § 825m.

As of 1951, this Court understood that the FERC had no authority to order restitution, even for fraudulent conduct in establishing rates. In *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951), all the members of the Court assumed that the FPC could not award damages for a utility's fraud in filing a rate, but disagreed as to whether a court could do so. Justice Frankfurter argued that the FPC should be permitted to determine the reasonable rate to replace the fraudulently-induced rate, so that a court could award damages. But he acknowledged that the Federal Power Act "does not authorize the Commission to award reparations to those subjected to unreasonable rates" and "likewise does not afford the Commission the authority . . . to award damages to those injured by violations of the Act. . . . " [*Id.* at 260 (Frankfurter, J., dissenting)]. This statement was part of a

dissent, but was not a point of disagreement in the decision.

The FERC apparently exercised no authority to award damages for contract violations for decades after its creation. In 1985, the United States Court of Appeals for the District of Columbia Circuit approved an early exercise of this authority in *Consolidated Gas Trans. Corp. v. FERC*, 771 F.2d 1536 (D.C. Cir. 1985). The Court noted that the FERC could use " 'means of regulation not spelled out in detail' " so long as its action was consistent with the policy embodied in the NGA. *Id.* at 1551. The court found statutory authority to support the FERC's action in Section 16 of the Act, which authorizes actions "necessary or appropriate" to carry out the purposes of the statute. *Id.* at 1550, citing 16 U.S.C. § 717o. This decision was cited with approval in *Towns of Concord, Norwood & Wellesley v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1990), a case involving the FPA. But these decisions simply find sufficient authority for the FERC to exercise concurrent jurisdiction with other tribunals; they do not hold that the FERC has exclusive jurisdiction.

Decisions of the lower courts confirm that the filed-rate doctrine does not provide either the FERC or other agencies with exclusive jurisdiction to interpret and enforce contracts. For instance, before it merged with Entergy, Gulf States Utilities withheld payments to Alabama Power Co. and filed suit in federal court, claiming that it should not have to purchase electricity from that utility under a FERC-approved contract. *Gulf States Utilities Co. v. Alabama Power Co.*, 824 F.2d 1465 (5th Cir. 1987). The defendant argued that only the FERC, not the courts, had jurisdiction to decide the dispute because the contract was filed with and approved by the FERC. *Id.* at

1470. The Fifth Circuit held that the Federal Power Act preempts courts and regulators from "changing the filed rate," "impos[ing] a rate different from the filed rate" or changing a "FERC allocation." *Id.* But the court held that the doctrine did not prevent a determination that a utility billed excessive costs under a tariff. It said:

> Finally, GSU complains that Southern has sold more than it should have under Schedule E by overstating the amount of available "Long Term Power." The FPA does not preempt this claim. Unlike Hall in *Arkla*, GSU does not seek relief based on a rate different from the filed rate. Rather, GSU complains about the quantity sold *at the filed rate* under Schedule E. . . .
>
> *Id.* at 1472.

In this case, similarly, Entergy billed ELI for an excessive quantity of capacity at the filed rate.

Gulf States Utilities is consistent with many other authorities holding that the filed-rate doctrine does not preclude courts from interpreting and enforcing tariffs. For instance, in a recent decision of the United States Court of Appeals for the Ninth Circuit, a communications carrier argued that the filed-rate doctrine prevented a federal district court from determining whether the carrier violated a tariff approved by the Federal Communications Commission. *Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166 (9th Cir. 2002). The court found that the matter did not have to be heard at the FCC: "The filed-rate doctrine precludes courts from deciding whether a tariff is reasonable, reserving the evaluation of tariffs to the FCC, but it does not preclude courts from interpreting the provisions of a tariff and enforcing the tariff." *Id.* at 1171.

Other federal courts have recognized that the filed-rate doctrine does not vest exclusive jurisdiction in a rate-setting agency to determine whether a tariff has been violated. *See, e.g., Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co.*, 297 F.2d 561, 567, *cert. denied*, 370 U.S. 937 (1962) (court could determine dispute concerning FPC-filed contract); *Southern Pacific Transp. Co. v. San Antonio*, 748 F.2d 266, 272 (5th Cir. 1984) (Courts often interpret terms of filed rate); *United States v. Garner*, 134 F. Supp. 16, 18 (E.D.N.C. 1955) ("It is well settled that . . . the courts may decide questions of construction of tariffs as legal documents."); *Consolidated Terminal Systems, Inc. v. ITT World Communications, Inc.*, 535 F. Supp. 225, 233 (S.D.N.Y. 1982).

A number of state courts also have determined that the filed-rate doctrine does not prevent courts from determining whether a party followed the terms of a tariff. *See, e.g., Union Pac. R.R. v. Structural Steel & Forge Co.*, 344 P.2d 157, 160 (Utah 1959) ("Since the words in the tariff are used in their ordinary meanings [a] state court can apply that legal construction to a state cause of action." (citations omitted)); *Pennsylvania R. Co. v. Nasshorn*, 116 N.Y.S. 2d 365 (N.Y. App. Div. 1952) (application of tariff classification is issue for courts); *Pennsylvania R. Co. v. Chromcraft Corp.*, 424 S. W.2d 104, 106 (Mo. Ct. App. 1967) ("Where . . . the issue [is] the construction or interpretation of a published tariff the courts, including a state court, may entertain jurisdiction."). Since state courts may perform this function, so may a state agency.

The federal and state courts also have applied a "primary jurisdiction" doctrine, which permits them to defer their jurisdiction when the interpretation of a tariff

requires special expertise presumably residing in the rate-setting agency. *See Great N. R. Co. v. Merchants Elevator Co.*, 259 U.S. 285 (1922) (Courts may decide tariff interpretation unless it requires "specialized agency expertise."). Thus, courts may defer when the issue is not within "the conventional experience of judges," but rather involves technical or policy considerations that first must be decided by the agency to protect a regulatory scheme. *National Communications Ass'n v. AT&T Corp.*, 46 F.3d 220, 222 (2d Cir. 1995); *Brown v. MCI WorldCom Network Services, Inc.*, 277 F.3d 1166 (9th Cir. 2002). Under the doctrine of primary jurisdiction, however, the FERC presumably would issue a declaratory order as to the meaning of the tariff, to be later applied by a court. *See, e.g., Arkansas Louisiana Gas Co.*, 7 F.E.R.C. 61,175 at 61,322 (F.E.R.C. 1999); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 264 (1951). In *Montana Dakota Utilities,* Justice Frankfurter, in dissent, discussed this method of obtaining advice from the FPC: "The fact that the Federal Power Commission is not itself authorized to award damages does not disable it from advising a court on questions on which its judgment is needed."

Obviously, if the FERC possessed "exclusive jurisdiction" to interpret tariffs, there would be no need for a "primary jurisdiction" doctrine to determine whether matters should be referred to the agency. Yet the FERC itself frequently *declines* to exercise primary jurisdiction, leaving tariff interpretations to courts or state agencies. This Court approved the FERC's decision not to interpret a contract in *Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571, 573 (1981). There, the FPC at first applied its then-existing "policy against assuming jurisdiction over matters pending before a court. . . . " *Id.* at 575 n.4. After an appeal

and remand, it declined again to exercise its jurisdiction, holding that the interpretation of a "most favored nations" clause in a FERC-filed contract required no special agency expertise. *Id.* at 575; *Arkansas-Louisiana Gas Co. v. Hall*, 7 F.E.R.C. ¶ 61,175 at 61,322-23 (1979). Thus, the FERC declined to question the Louisiana Supreme Court's interpretation of the contractual provision. This Court saw "no reason to disagree" with the determination "that interpretation of the favored nations clause raises only questions of state law." 451 U.S. at 579 n.9.

More recently, the FERC has often declined invitations to invoke primary jurisdiction. *See Portland General Electric Co.*, 72 F.E.R.C. ¶ 61,009, 61,021-022 (1995) (breach of power sale contract should be heard in Oregon courts); *Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co.*, 81 F.E.R.C. ¶ 61,056, 61,278 (1997) (FERC declines to exercise jurisdiction on the transmission and purchase obligations contained in a power purchase agreement because the FERC does "not possess special expertise in this particular subject matter"). Only two years ago, in *PPL Montana, LLC,* 96 F.E.R.C. ¶ 61,313 (2001), the FERC declined to exercise jurisdiction over whether a service agreement was breached because whether one party "is scheduling more power than permitted under its Agreement ... is simply not a question central to the Commission's regulatory responsibilities." *Id.* at 62,208. Billing for more capacity than permitted, of course, is just what Entergy did in this case.

The FERC not only defers contract issues to state courts, but has indicated a willingness to defer these issues to state public service commissions. In *Public Service Co. of New Hampshire v. New Hampshire Elec. Coop., Inc.*, 55 F.E.RC. ¶ 61,028 (1991), the FERC referred

to its "'normal'" practice of declining "to assert jurisdiction over billing and metering disputes turning on the application of state contract law." *Id.* at 61,078. It said:

> Because the Cooperative's right to a set-off purportedly derives from its contractual rights under New Hampshire law, instead of the Federal Power Act or this Commission's precedent, a more appropriate forum for the adjudication of this claim is the New Hampshire courts *or the New Hampshire Commission*.

Id. at 61,079 (emphasis added). In that case, the seller claimed underpayments under a contract, but the language applies just as well to suits for the collection of overpayments.

Given this mountain of authority, the claim that the FERC possesses "exclusive" jurisdiction to interpret and enforce contracts has no basis. Paradoxically, ELI and the United States support this assertion of exclusive jurisdiction only by citing an isolated statement *from the very order they seek to overturn*. [ELI Br. at 15; U.S. Br. at 19]. The "exclusive" jurisdiction predicate forms the basis for their argument, although they must know it is incorrect. Thus, these parties evade confronting their true request – that the Court overturn 80 years of precedent. This evasive approach cannot provide a basis for making constitutional law.

Nor could ELI and the *amici* validly contend that this case presents an issue requiring the exercise of the FERC's primary jurisdiction. In declaring ERS units available, Entergy did not even follow the *process* outlined in the tariff; any reasonable person can see that on the face of the minutes. Nor did Entergy consider the factors prescribed by the FERC or record its analysis of those factors.

Drawing this conclusion does not require the FERC's specialized expertise.

The terms of the FPA and the history of contract enforcement establish that the FERC has no "exclusive" jurisdiction over contract disputes. The FPA authorized the FERC *to go to court* to enjoin "a violation of the provisions . . . of any order" issued under the Act. 16 U.S.C. § 825m. It gave the FERC no enforcement authority. The authority since *inferred* by the FERC does not displace the jurisdiction of courts to decide contract disputes and it cannot preempt the authority of state commissions to consider the terms of contracts in establishing retail rates.

The Court has recognized that "[t]he regulation of utilities is one of the most important of the functions traditionally associated with the police powers of the States." *Arkansas Elec. Coop. Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 377 (1983). Congress passed the FPA in an effort to augment state regulation; it was designed as "a complement to and in no sense a usurpation of State regulatory authority. . . . " H.R. REP. No. 74-1318, at 8 (1935). Since the "critical question in any pre-emption analysis is whether Congress intended that federal regulation supersede state law," the Court should not expand the FPA to displace the LPSC's traditional authority. *Louisiana Pub. Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986).

The FERC has no "exclusive" jurisdiction over contract disputes. In relying on the "exclusive" jurisdiction theme, ELI and the *amici* rest their arguments on an incorrect premise. Therefore, their conclusions are untenable and should be rejected.

B. The *Nantahala* and *MP&L* Cases Deal With the FERC's Exclusive Jurisdiction to Establish Tariffs, Not the Shared Jurisdiction of Enforcement, and Have No Application Here.

Because of the absence of authority to support their claim that the FERC has "exclusive" jurisdiction to interpret tariffs, ELI and the United States rely most heavily on cases dealing with the FERC's exclusive jurisdiction to establish just and reasonable rates. Neither of these cases – *Mississippi Power & Light v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), nor *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986) – involved a claim that a utility breached the terms of a contract filed with the FERC. Instead, both involved efforts by state agencies to disallow costs assessed in compliance with FERC tariffs, based on grounds that were actually decided or could have been decided by the FERC in establishing the just and reasonable rate. The Court understandably required that the state agencies pass through to ratepayers the costs assessed *in compliance* with the FERC tariffs, but these decisions hardly support giving preemptive effect to charges assessed *in violation* of FERC tariffs. Indeed, extending *MP&L* and *Nantahala* to prevent state agencies from disallowing costs assessed in breach of federal law would turn them inside out.

In *MP&L*, the Court determined that a state agency could not disallow costs as imprudent that were included in a tariff approved by the FERC, even if the prudence issue was not actually litigated at the FERC. That decision is eminently reasonable, because a determination that rates are "just and reasonable" necessarily means the costs included in the rate are reasonable. Any claim that the costs are imprudent would have to be raised at the

FERC, which has exclusive jurisdiction to alter or approve the rate. Thus, the Court emphasized that the prudence issue was a matter to be determined in establishing the rate, and the state action effectively "challenge[d] the reasonableness of FERC's allocation." 487 U.S. at 374, 375-76. In holding that a state must pass through costs assessed in compliance with a tariff, the Court also implied that a state agency may *not* pass through an overcharge assessed in violation of a FERC cost allocation: "FERC-mandated allocations of power are binding on the states, and states must treat these allocations as fair and reasonable when determining retail rates." *Id.* at 371.

Similarly, *Nantahala* required a state commission to accept an allocation of power mandated by the FERC, but it did not require acceptance of an over-allocation imposed by a parent in violation of the clear terms of the tariff. The key finding in *Nantahala* was that "Nantahala could not have treated itself as having access to any more low-cost entitlement power than it is eligible to include under FERC's interpretation of what would be a fair allocation." 476 U.S. at 972-73. Thus, the state was required to respect the utility's obligation to comply with the tariff.

Both *MP&L* and *Nantahala* upheld the FERC's exclusive jurisdiction to *establish* just and reasonable rates. They do not deal with issues of tariff compliance, over which the FERC does not have exclusive jurisdiction. This distinction was recognized by this Court in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981). In that case, a natural gas seller brought an action in state court to enforce a favored nations clause in a gas sales contract that gave the seller the right to collect the highest gas price paid by the buyer to any supplier. The seller, which had been receiving for years the original negotiated rate

that was on file with the FERC, brought suit when it discovered that the buyer had been paying more to another supplier. The Louisiana Supreme Court awarded damages to the seller in the amount of the difference between the FERC-filed rate and the higher rate paid to the alternate supplier. This Court held that the Louisiana Supreme Court was the appropriate authority to interpret the natural gas contract, but that the filed-rate doctrine precluded the state court from awarding damages, based on a rate different from that filed with the FERC. *Id.* at 584-85. The Court thus affirmed the Louisiana Supreme Court's interpretation of the contract and all other aspects of its ruling except the damage award, to the extent it conflicted with the FERC-filed rate. *Id.*

In holding that the state court has the authority to interpret and enforce the contract, this Court recognized that state court interpretations of tariffs do not violate the filed-rate doctrine. The Court discussed *Pan American Petroleum Corp. v. Superior Court of Del.*, 366 U.S. 656 (1961), which stands for the proposition "that a state rather than a federal court was the proper forum in which a buyer should bring a breach-of-contract action to obtain a refund of charges in *excess* of the filed rate." 453 U.S. at 582 n.12 (emphasis in original). The Court reaffirmed that principle: "Permitting that action in no way contravened the filed-rate doctrine; in fact, it furthered the doctrine's purpose." *Id.*

The efforts of ELI and the United States to apply the "no choice" rationale of *Nantahala* to support preemption also pervert the Court's reasoning. [ELI Br. at 34; U.S. Br. at 25]. In *Nantahala*, the Court ruled that a state agency might permissibly challenge a utility's choice to acquire an excessive quantity of power at a FERC-filed rate, but it

could not do so when the FERC decision dictated the quantity to be purchased. 476 U.S. at 972-73. In other words, the FERC allocation left the utility with "no choice." That ruling can hardly be applied to the parent-subsidiary arrangement, where the parent's overcharge to the subsidiary leaves the subsidiary with "no choice" but to accept the overcharge. The *parent's decision* to deviate from the tariff necessarily involves an affirmative, and illegal, "choice."

Of course, ELI's "no choice" argument is ironic here, since Entergy told the FERC and the United States Court of Appeals for the District of Columbia that its operating companies required an "incentive" to obey the wishes of the parent. *Louisiana Pub. Service Comm'n v. FERC*, 174 F.3d 218, 225-27 (D.C. Cir. 1999). Now the same operating companies supposedly have "no choice" but to accept Entergy's illegal overcharge of costs. Obviously, the current version of intercorporate discipline reflects the true relationship, but the fact that a parent gives "no choice" to the subsidiary does not vest the parent with federal preemptive power.

Additionally, even a utility subsidiary with "no choice" to defy a parent has a duty, under the prudence standard, to act reasonably to minimize costs to customers. Any independent utility, faced with an overcharge from a supplier under a contract, would refuse to pay the bill. This refusal would not reflect a "parochial" view of the contract, but a legitimate interest in enforcing its terms. Similarly, ELI had a duty to enforce the System Agreement. The fact that Entergy compelled ELI to pay the excessive charge does not absolve ELI of the duty to act prudently. A utility must act reasonably to minimize costs, because "only the utility, and not the ratepayer, is in a

position to minimize imprudence and maximize efficiency. . . . " *Gulf States Utilities Co. v. Louisiana Public Service Comm'n*, 689 So. 2d 1337, 1346 (La. 1997).

MP&L and *Nantahala* preempted state authority based on the FERC's jurisdiction to establish just and reasonable rates. They do not preempt state authority to determine whether utilities have complied with FERC tariffs. Therefore, these cases do not provide a basis for overturning the LPSC's decision.

C. The LPSC's Decision to Disallow an Excessive Affiliate Allocation Was an Appropriate Exercise of the State's Regulatory Function and Does Not Illegally "Trap" Costs.

The LPSC's disallowance of the excessive charge for ERS capacity was an appropriate exercise of its regulatory authority and does not illegally "trap" costs. Entergy violated its FERC tariff in overcharging ELI for capacity under Service Schedule MSS-1. Disallowing the overcharge may deny costs to the utility, but that is no different from the consequence of any regulatory ruling that a parent overallocated costs to an affiliate. Costs are "trapped" for preemption purposes only when a state agency denies recovery in retail rates of costs imposed under a FERC tariff. Therefore, the LPSC's Order does not offend the Supremacy Clause.

The LPSC is empowered under the Louisiana Constitution to exercise plenary authority over the rates and service of public utilities. La. Const. Art. IV, § 21. This mandate requires the LPSC to examine the propriety of affiliate transactions. La. R.S. 45:1176. The LPSC often reviews affiliate transactions because holding companies

have incentives to push costs into the regulated arena and into jurisdictions that conduct frequent cost of service reviews. This action permits the prompt recovery of excessive cost allocations from retail ratepayers, while increasing profits in the company's unregulated operations or in jurisdictions where rates are not frequently reviewed.

The LPSC uses many of the tools created by the FPA and PUHCA in regulating affiliate transactions. Deviations from FERC-prescribed accounting practices may signal an improper assessment of costs. The utility's selection of inappropriate cost allocation methods from among those filed with the Securities and Exchange Commission may indicate an effort to funnel costs into certain jurisdictions. And here, the tariff approved by the FERC provided a basis for evaluating the utility's cost allocation, an allocation that overcharged ELI for unavailable capacity.

The Court's decisions in *MP&L* and *Nantahala* recognize the power of state agencies to interpret and apply FERC-filed contracts. In both cases, the Court required the state agencies to increase retail rates to pass through costs assessed in compliance with those tariffs. This directive necessarily implies determining what the tariff requires. *MP&L*, 487 U.S. at 373 (Mississippi PSC must allow recovery of cost incurred in paying "FERC-determined wholesale rate for FERC-mandated allocation of power."). If state agencies may determine what a FERC-filed contract requires, they can also determine what it forbids.

This exercise of jurisdiction accords well with the purpose of the FPA; indeed, the FERC-approved tariff in this case performed a function intended by Congress. Congress passed the FPA "to aid the state commissions in

their efforts to ascertain and fix reasonable charges." H.R. REP. No. 74-1318, at 8 (1935). In doing so, Congress recognized and affirmed the "responsibilities of state regulatory commissions" in regulating the retail impact of holding company transactions. *Id.* Here, the FERC's establishment of the new tariff requirements provided the LPSC with the standard for determining the appropriateness of Entergy's System Agreement billings. Judged against that standard, Entergy's cost assessment overcharged ELI and would have impermissibly harmed retail ratepayers.

Entergy was supposed to follow a process before including an ERS unit in MSS-1, but did not; it was supposed to consider specific criteria for counting the units "available," but did not; it was supposed to record the reasons showing how it considered these criteria in minutes, but did not. [Resp. App. at 12-15; Pet. App. at 53a, 74a]. Thus, the ERS units were not eligible for inclusion in System Agreement billings. In disallowing the overcharge, the LPSC performed a necessary regulatory task. The disallowance did not "trap" costs in the preemption sense, because the overcharge exceeded the costs that could be assessed under the FERC-approved tariff. The LPSC passed through all the costs that were validly billed to ELI, so it could not have "trapped" any costs.

ELI does not claim that it complied with the tariff, but it does offer a half-hearted argument that the FERC granted Entergy discretionary authority to ignore the process that the tariff requires. [ELI Br. at 38]. Thus, says ELI, the idea that Entergy must actually obey the tariff rests on "formalistic distinctions that have no substance." [*Id.* at 37]. Apparently ELI believes that the FERC's assurances that the tariff amendment would deny Entergy

"unfettered discretion" were offered with a wink. [Pet. App. at 152a, 154a]. But Entergy itself argued that the tariff would curb the Operating Committee's discretion, and both Entergy and the FERC urged this position in the court of appeals. The court accepted that contention, holding that the tariff did not delegate too much discretion to Entergy. *Louisiana Pub. Service Comm'n v. FERC*, 174 F.3d 218, 231 (D.C. Cir. 1999). After all that, Entergy's decision to flout the tariff's requirements can only be deemed a stark violation of federal law.

Additionally, ELI had remedies if it believed the LPSC's interpretation was erroneous. It could have appealed the finding of a tariff violation in the state courts, and ultimately to this Court, but it chose not to do so. It could have instituted a declaratory order proceeding at the FERC to seek a favorable interpretation of the contract, as Arkansas Louisiana Gas Co. attempted in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 579 n.9 (1981). Instead, ELI allowed the LPSC's finding of a tariff violation to become final. Given that finding, there can be no impermissible "trapping" of costs.

Charges assessed by a parent to an affiliate in violation of a FERC tariff cannot be "trapped" by a state agency in the sense used in *Nantahala* and *MP&L*. Indeed, imposing these costs on ratepayers would impose a "reverse trapping," in which the Supremacy Clause is misused to legitimize utility overcharges. The Court should not approve the requests to adopt this inverted view of the preemption doctrine.

II. THE NEW RULE OF "PRESUMPTIVE UTILITY PREEMPTION" PROPOSED BY ELI AND THE *AMICI* WOULD SUBVERT THE INTENT OF THE FEDERAL POWER ACT AND IMPROPERLY HANDCUFF STATE REGULATORS.

The core request of ELI and the *amici* is revealed in their briefs, although it is lightly camouflaged. They seek a new rule of presumptive preemption for sellers of wholesale electric service, which would require state agencies to accept and buyers to pay contract overcharges until they obtain relief at the FERC. Thus, ELI asserts that the LPSC should be presumptively bound by "determinations that the System makes," the United States contends that Entergy's determinations are "presumptively lawful" even when they facially violate the tariff, and EEI advocates a "bright line" in which decisions of privately-owned "regional entities" should carry the preemptive force of federal law. [ELI Br. at 38; U.S. Br. at 13; EEI Br. at 23]. If granted, these requests would pervert the FPA, burden state regulators, and unduly harm consumers.

Congress passed the FPA to curb abuses of holding companies, not to empower those entities. The FPA was part of the Public Utility Act of 1935, a law enacted because holding companies had engaged in many affiliate abuses that injured consumers and frustrated state regulatory efforts. S. REP. No. 74-1903, at 2 (1935). Thus, Congress declared that the national interest is adversely affected:

> When subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition;

> which service, management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States.
>
> 15 U.S.C. § 79a(b)(2).

Congress adopted the Act to facilitate state regulation where it was permissible under *Attleboro*. Congress imposed "Federal regulation only over those matters which cannot effectively be controlled by the States," and removed from the bill "every encroachment upon the authority of the States." S. REP. No. 74-621, at 18 (1935). Congress pursued a policy "to assist the States in the exercise of their regulatory powers, but not to impair or diminish the powers of any State commission." S. REP. No. 74-621, at 48 (1935).

The regulation of affiliate transactions is a traditional aspect of state utility regulation. The Public Utility Act of 1935 recognized this traditional state role and enacted tools, such as uniform accounting requirements, to prevent holding companies from frustrating state efforts to curb their abuses. The authorization to the FPC to establish just and reasonable rates for wholesale electric sales further facilitated this effort by regulating the terms on which sales could be made and providing a benchmark against which state regulators could assess the sellers' charges.

Against this background, the requests that the Court accord presumptive validity to sellers' billings under FERC-filed contracts would subvert the intent of the Act. Entergy, like other holding companies, has one all-consuming goal: to maximize its profits. For Entergy, avoiding disruptions in System Agreement payments that

might provoke retail rate cases has been a primary goal for two decades. Entergy offered other rationales at the FERC for its violation of MSS-1 from 1986-97, but an executive admitted that a primary purpose was to stabilize payments and "avoid the initiation of rate cases by state regulators." *Louisiana Pub. Service Comm'n v. FERC*, 174 F.3d 218, 229 (D.C. Cir. 1999). The same motive existed when Entergy violated the amended tariff in this case. But corporate profit maximization was not a goal of the FPA, nor could Congress have intended to grant holding companies the power to overcharge customers in the pursuit of that objective.

Additionally, the request for a new rule of "utility preemption" would severely hamper state agency efforts to regulate affiliate power transactions. Already, state agencies operate with limited staffs and preapproved budgets; faced with a tariff violation by a parent, they may be unable to pursue a complaint case at the FERC. In cases where a violation produces an overcharge in the test year that is relatively small – say less than $1 million – the cost and obstacles associated with a FERC proceeding may make it impractical to pursue a complaint. The newly-confected preemption rule would simply require that abusive charges be passed through to ratepayers.

Even when a utility imposes a large overcharge on an affiliate, compelling the state agency to pursue a case at the FERC, the likelihood of prompt relief is slim. First, the utility parties to the contract undoubtedly would oppose the complaint, using resources that are often unavailable to state regulators. Second, the FERC may not hear the case, at least in any reasonable amount of time. Indeed, the FERC today is consumed with fashioning new regulatory policies and often ignores even those complaint cases

it is statutorily bound to decide. As the Delaware Municipal Electric Corp. recently stated in comments concerning the FERC's proposed Standard Market Design: "The Commission's behavior and procedure with respect to complaints especially by customers have been disappointing. Sometimes, the Commission, especially its Staff, views the complaints filed with the Commission as a nuisance and waste of the Commission's resources." Comments by Delaware Mun. Elec. Corp., Inc., Docket No. RM01-12-000, ¶ 37 (Nov. 15, 2002).

The extent of the difficulty that would face a state agency may be illustrated by reference to the history of a FERC Complaint Case filed by the LPSC. In 1995, the LPSC alleged that the Entergy System Agreement was discriminatory for its failure to provide credit for interruptible loads in allocating capacity costs, contrary to FERC precedent. The FERC delayed acting on the complaint for more than a year, dismissed it, and then delayed acting on the obligatory application for rehearing for about a year. On appeal, the dismissal was reversed as "quintessentially arbitrary and capricious" by the United States Court of Appeals for the District of Columbia Circuit. *Louisiana Pub. Serv. Comm'n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999). After a remand from the court of appeals, the FERC again delayed acting for more than a year. When the LPSC sought mandamus relief in the court of appeals, the FERC suggested that it had discretion to delay hearing the case for *four to ten years*. FERC Response at 6 n.1, *Louisiana Pub. Serv. Comm'n v. FERC*, No. 97-1661 (D.C. Cir.). The court of appeals denied the writ of mandamus, and the LPSC was forced to seek mandamus relief in this Court. *Louisiana Pub. Serv. Comm'n v. FERC*, No. 00-405. Only at that point, in late 2000, did the FERC set the case for hearing. An ALJ

issued an Initial Decision in 2001, but the matter is still awaiting decision before the FERC, eight years after it was filed.

Granting preemptive power to utilities would carry other adverse consequences for retail regulators. Even when a utility correctly calculates charges under a FERC tariff, state agencies often must adjust the manner in which the utility seeks to collect the cost in retail rates. Entergy has a history, for example, of portraying its wholesale purchases as "all energy" and trying to pass them through retail fuel adjustment clauses. But purchases made to meet peak demand should be split into a "capacity" component, recoverable in base rates, and an "energy" component, recoverable through the final clause. Otherwise the utility would obtain a double recovery of the capacity component, since base rates already provide an allowance for capacity charges. *See Ex parte Entergy Louisiana, Inc. and Entergy Gulf States, Inc.*, Order No. U-24889, 2000 La. PUC LEXIS 223 at *22-*37 (La. P.S.C. 2000). If utilities had presumptive preemptive power in determining what FERC tariffs require, these adjustments would also be in jeopardy.

Additionally, the rule proposed by ELI and its *amici* would funnel *all* litigation to the FERC. Because these parties seek to transplant the "exclusive jurisdiction" rationale of *MP&L* and *Nantahala* into the area of tariff enforcement, they are forced to argue that *all* billing disputes under FERC-filed contracts must go to the FERC. Under this argument, the proposed presumptive validity of the seller's charge would require *all* buyers to pay first and seek relief only at the agency. This new rule would create a waiting line of immense length, burdening the FERC and interminably delaying consumer relief.

Further, the "bright line" proposal of EEI – to extend the badge of presumptive preemption to all billing decisions made by privately-owned regional transmission operators that may be created in the future – shows the potentially disastrous consequence of presumptive utility preemption. EEI predicts that regional entities will not only run the national transmission system, but will also control the wholesale power markets, effectively taking over most aspects of power production and delivery. In EEI's world, buyers would have no choice but to accept the billing decisions of the regional entity. [EEI Br. at 11]. EEI notes that future agreements will often be "subject to different interpretations," so it proposes that a regional entity's interpretations bind all buyers of service and all state commissions, unless corrected in a complaint case at the FERC. [*Id.*]

Putting aside the doubtful wisdom of making constitutional law to address potential future occurrences, the EEI proposal would invite rampant abuse of consumers. Regional transmission operators will own transmission assets or will operate them to produce profits for the owners; their motives will not include a desire to protect consumers. In some cases, utilities may have so-called "passive" ownership in transmission corporations. Regional operators may favor some buyers over others, overcharge customers to enhance profits, misinterpret contracts, misallocate costs through error, or overbill customers for other reasons. Requiring buyers and state agencies to pay these overcharges up front, and funneling all disputes to the FERC, would deny effective remedies to buyers.

The proposal of ELI and the *amici* conflicts with the purpose of the FPA. The Act was enacted to curb holding company abuses, not to infuse these companies with federal preemptive power. Therefore, the "utility preemption" request should be rejected.

CONCLUSION

The LPSC disallowed the ERS costs of ELI because Entergy, ELI's parent, violated the objective terms of a FERC tariff. This disallowance does not conflict with federal law because an overcharge does not bear the badge of FERC approval. The FPA does not grant the FERC exclusive jurisdiction to interpret tariffs and was never intended to prevent state agencies from correcting cost misallocations among affiliates. Therefore, the Court should decline the invitation to create a new constitutional rule of utility seller preemption. The judgment of the Louisiana Supreme Court should be affirmed.

Respectfully submitted,

EVE KAHAO GONZALEZ, ESQ.
General Counsel
LOUISIANA PUBLIC SERVICE COMMISSION
One American Place,
Suite 1630
Baton Rouge, Louisiana
70821

MICHAEL R. FONTHAM*
PAUL L. ZIMMERING
NOEL J. DARCE
DANA M. SHELTON
JASON M. BILBE
STONE PIGMAN WALTHER WITTMANN L.L.C.
546 Carondelet Street
New Orleans, Louisiana
70130
(504) 581-3200

Counsel for Respondents

**Counsel of Record*

April 2, 2003